

Health (Tobacco, Nicotine etc. and Care)(Scotland) Bill

Royal College of Nursing

The Royal College of Nursing (RCN) Scotland welcomes the opportunity to provide written evidence to the Health and Sport Committee on the Health (Tobacco, Nicotine etc. and Care)(Scotland) Bill.

The Royal College of Nursing (RCN) is the UK's largest professional association and union for nurses, with around 425,000 members, of which over 39,000 are in Scotland. Nurses and health care support workers make up the majority of those working in health services and their contribution is vital to the delivery of the Scottish Government's health policy objectives.

Our written evidence relates specifically to Parts 2 and 3 of the Bill on Duty of Candour and Ill-treatment and wilful neglect respectively and provides answers to Questions 4, 5 and 6 in the call for written evidence.

Duty of Candour – *The Bill proposes to place a duty of candour on health and social care organisations. This would create a legal requirement for health and social care organisations to inform people (or their carers/families) when they have been harmed as a result of the care or treatment they have received.*

4. Do you support the proposed duty of candour?

Broadly, we support the creation of a legal requirement for health and social care organisations to inform people (or their carers/families) when they have been harmed as a result of the care or treatment they have received and support the principles of transparency, honesty and openness.

We agree that people harmed should be informed and putting a duty of candour on statutory footing will help close the gap between what is good practice and what may be happening in some instances 'on the frontline'. By requiring and supporting those currently unwilling to disclose and discuss errors, it should prompt an organisational shift and positively encourage a culture of openness, learning and ongoing improvement to the benefit of all those who use our health services.

A statutory *organisational* duty would, we believe, be more effective at achieving a consistent approach across all health and care services than the individual duties imposed by individuals' codes of professional conduct and/or related guidance.

It is clear from the Policy Memorandum and the Bill that the intent of the Duty of Candour is an organisational – not an individual – duty. As long as this is the case, we broadly support the principle of the Bill, but raise a number of points for clarity in answer to Question 6 (below).

Ill-treatment and wilful neglect – *The Bill would establish a new criminal offence of ill-treatment or wilful neglect which would apply to individual health*

and social care workers, managers and supervisors. The offence would also apply to organisations.

5. Do you support the proposal to make wilful neglect or ill-treatment of patients a criminal offence?

We do not agree that a new offence should be created now. Our primary concern about the creation of a new criminal offence, even if it is intended for only the most exceptional cases of neglect or ill-treatment, is that it will have the opposite effect to that intended. We believe there is a significant risk that the threat of criminal proceedings against an individual will encourage organisations, staff, patients, their families and carers, to 'look for someone to blame'. This could halt any moves, either by individuals or organisations, towards greater openness when something goes wrong in health care. We know that greater openness enhances patient safety¹; and we believe that the existing criminal and civil law or professional sanctions for addressing neglect or ill-treatment, when applied properly, can deal with any serious failings in health care delivery.

When care falls below the required standards, nurses most commonly report to us² that this is as a result of factors such as low staffing levels, lack of training and development, poor support and ineffective or misguided leadership. So the legal focus on the individual – as proposed – could detract attention away from wider organisational issues.

In Scotland, there is already provision in both criminal and civil law as well as protecting vulnerable groups (PVG) legislation and professional or regulatory disciplinary measures and sanctions to address instances of 'patient abuse' or ill-treatment. So we believe the justice and professional regulatory systems (such as the NMC and GMC) can already deal effectively with cases of deliberate neglect or mistreatment when they arise. The creation of a new offence is therefore unlikely to add anything of value to those existing remedies – and there is no evidence, either, that the perpetrators of neglect or ill-treatment have gone unpunished or not been held to account.

According the NHS Scotland staff survey³ only 57% of staff currently feel that it is safe to speak up and challenge the way things are done. In our view, therefore, staff will be less open and less honest when things go wrong out of fear that they may expose themselves or their colleagues – and this would be compounded if criminal charges and years of uncertainty and the stress of our adversarial criminal justice system could result.

There are also other risks. This new offence could cause some healthcare professionals to practice inappropriately, where the patients who shout the loudest are treated more favourably, so that staff protect themselves from possible accusations of wilful neglect.

¹ 87 Etchegaray, JM., Gallagher, TH., Bell, SK et al. (2012). Error disclosure: a new domain for safety culture assessment. *BMJ Quality and Safety*, 21, 594-599

² http://www.rcn.org.uk/__data/assets/pdf_file/0003/551343/Scotland_survey_2013_final.pdf

³ <http://www.gov.scot/Publications/2014/12/8893/6>

So, while we broadly support the statutory duty of candour, we believe the new culture of openness as a result should be allowed to become embedded before further consideration is given as to whether making wilful neglect or ill treatment a criminal offence is necessary. We also find it slightly contradictory that both the Duty of Candour and Wilful Neglect are presented in a single Bill, when the fear of prosecution might stifle people's adherence to Duty of Candour.

6. Is there anything you would add/remove/change in the Bill with regards to these provisions?

Rather than introduce a new criminal offence of ill-treatment or wilful neglect which would apply to individuals if things go wrong, the introduction of restorative justice should be considered, where the consent of the patient, health professionals and organisation is sought and the skills of a mediator or facilitator independent of the organisation are used.

As regards the Duty of Candour provisions:

- We would like to see how the statutory duty of candour will fit in the current legislative and policy framework, i.e. how will it fit with organisations' existing policies and procedures, for example, on whistleblowing, grievances, the current reporting of adverse events/incidents and the CNORIS scheme.
- There should be clarity and further guidance on the requirement to publicly report incidents to avoid identifying individuals and how to take into account organisations' duties in relation to personal data under the Data Protection Act 1998.
- The proposed definition of Duty of Candour is broad. This may cause difficulties with statutory interpretation, as well as with recognising such an event in practice. Clarity on the meaning of 'unintended' and 'unexpected', for example, would need to be clear.
- Given the integration of health and social care, where care provision will be increasingly flexible and may cross the boundaries between health and social care, there needs to be clarity about where duty of candour responsibilities lie between health boards, local authorities and integration joint boards.
- The Bill proposes that monitoring of duty of candour will be carried out by Healthcare Improvement Scotland, the Care Inspectorate and Scottish Ministers. There needs to be mechanisms in place to ensure consistency of monitoring compliance.
- We support the Bill's provision to make regulations around staff training and support. The Duty of Candour would be an organisational responsibility, so the organisation must ensure staff have the required training, support, knowledge and skills to implement the duty of candour, and this must apply to all relevant staff.